

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELE ROCKEY, on behalf)	
of H.R., a minor child,)	No. CV-04-469-CI
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
v.)	AND DIRECTING ENTRY OF
)	JUDGMENT FOR DEFENDANT
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 20, 23), submitted for disposition without oral argument on October 3, 2005. Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolfe represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff filed for Supplemental Security Income benefits on

1 behalf of the minor child on August 23, 1999, alleging disability as
2 of the date of birth, February 23, 1998. Benefits were denied
3 initially and on reconsideration; an administrative hearing was held
4 before Administrative Law Judge (ALJ) R. J. Payne, who denied
5 benefits. Review was granted by the Appeals Council and the matter
6 was remanded for consideration of additional issues. Following a
7 second administrative hearing, benefits were denied. Review was
8 denied by the Appeals Council. Plaintiff filed this appeal. The
9 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

10 **ADMINISTRATIVE DECISION**

11 The ALJ concluded the minor child had not engaged in
12 substantial gainful activity since the alleged onset date. He
13 suffered from severe impairments, including expressive and receptive
14 language delays, but the impairments were neither found to meet the
15 Listings nor to result in marked and/or extreme functional
16 limitations. (Tr. at 22.) The ALJ found the minor child had less
17 than marked limitations in his ability to acquire and use
18 information, attend and complete tasks, care for self, and health
19 and physical well-being. All other functions were found to be
20 without limitations. Thus, the ALJ concluded the minor child was
21 not disabled.

22 **STANDARD OF REVIEW**

23 The standard of review applicable to juvenile claims for
24 benefits is set forth in 20 C.F.R. § 416.924(d)(2000): The ALJ must
25 determine whether a claimant's impairments "meet, medically equal or
26 functionally equal a listed impairment in appendix 1 of subpart P,
27 part 404 of the CFR." The claimant's impairment will medically
28 equal a listed impairment "if the medical findings are at least

1 equal in severity and duration to the listed findings." 20 C.F.R. §
2 416.924(d)(1) (2000). The impairment will be considered functionally
3 equivalent if the claimant has marked limitation in two areas or
4 extreme limitation in one area. 20 C.F.R. § 416.926a(a)(2000).
5 Functional equivalence may be shown in the following six domains:
6 (1) acquiring and using information; (2) attending and completing
7 tasks; (3) interacting and relating with others; (4) moving about
8 and manipulating objects; (5) caring for self; and (6) health and
9 physical well-being. 20 C.F.R. § 416.926a(b) (1)(i), (ii), (iii),
10 (iv), (v), and (vi) (2001). In making a determination of disability,
11 the ALJ must develop the record and interpret the medical evidence.
12 *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011-12 (9th Cir.
13 2003), citing *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996).
14 The ALJ must consider the "combined effect" of all the claimant's
15 impairments without regard to whether any such impairment, if
16 considered separately, would be of sufficient severity. 20 C.F.R.
17 § 416.923.

18 ISSUES

19 The question presented is whether there was substantial
20 evidence to support the ALJ's decision denying benefits and, if so,
21 whether that decision was based on proper legal standards.
22 Plaintiff asserts the ALJ erred when he relied on the opinion of the
23 consulting medical expert who testified at the administrative
24 hearing, without proper consideration of the evaluation by Spokane
25 Public Schools, as directed by the Appeals Council.

26 ANALYSIS

27 1. Consulting Opinion

28 Plaintiff contends the ALJ erred when he relied on the

1 testimony of consulting physician, Dr. Roger J. C. Meyer, without
2 properly considering the findings of school evaluators, as directed
3 by the Appeals Council. Those evaluators concluded in 2000 when the
4 minor child was 2 years and nine months old, that there were
5 significant delays (more than two standard deviations below the
6 norm) in communication, daily living, socialization and motor
7 skills. (Tr. at 136-143.) Defendant contends there is no evidence
8 to support a finding the minor child had marked limitations in at
9 least two domains as of the date of the ALJ's decision following
10 remand.

11 During the administrative hearing, the ALJ considered the
12 school evaluations done in 2000, when the child had not yet reached
13 his third birthday, with those evaluations completed later after
14 physical, occupational, and speech therapy. The concerns identified
15 by the Appeals Council were addressed at the administrative hearing
16 during the examination of the medical expert. (Tr. at 440.) The
17 expert observed the limitations noted by the Appeals Council were
18 the result of a test that was "notoriously unreliable" because they
19 were obtained before the child turned three years of age. (Tr. at
20 441.) He also noted significant progress was made after three years
21 of age as a result of the different therapies provided to the child.
22 Dr. Meyer noted Plaintiff was in a regular school classroom with
23 only 30 minutes of additional physical therapy. (Tr. at 443.)
24 Additionally, he opined the child's Attention Deficit Hyperactive
25 Disorder (ADHD) behavior did not necessarily imply an impairment,
26 but rather the fact the child was "behaviorally rambunctious." (Tr.
27 at 445.) This observation was due to the fact medications were
28 assisting and the child was able to behave well at school and take

1 direction from his teachers, unlike at home where acting out was the
2 norm. (Tr. at 445.) Thus, the more appropriate diagnosis was
3 oppositional defiant disorder, rule/out ADHD as noted by Dr. Dexter.
4 (Tr. at 445-46.)

5 Based on the expert's testimony and evidence, the ALJ concluded
6 Plaintiff had less than a marked limitation in the area of acquiring
7 and using information, less than marked in attending to and
8 completing tasks, no limitation in interacting and relating to
9 others, no limitation in the area of moving about and manipulating
10 objects, less than marked limitation in the area of caring for self,
11 and less than marked limitation in the area of health and physical
12 well being. (Tr. at 28, 374-75.)

13 The opinion of a non-examining physician may be accepted as
14 substantial evidence if it is supported by other evidence in the
15 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
16 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
17 Cir. 1995). The opinion of a non-examining physician cannot by
18 itself constitute substantial evidence that justifies the rejection
19 of the opinion of either an examining physician or a treating
20 physician. *Lester*, at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502,
21 506 n.4 (9th Cir. 1990). Cases have upheld rejection of an
22 examining or treating physician based in part on the testimony of a
23 non-examining medical advisor; but those cases have also found
24 reasons to reject the opinions of examining and treating physicians
25 that were independent of the non-examining doctor's opinion.
26 *Lester*, at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55
27 (9th Cir. 1989) (reliance on laboratory test results, contrary
28 reports from examining physicians and testimony from claimant that

1 conflicted with treating physician's opinion); *Andrews*, 53 F.3d at
2 1043 (conflict with opinions of five non-examining mental health
3 professionals, testimony of claimant and medical reports); *Roberts*
4 *v. Shalala*, 66 F.3d 179 (9th Cir. 1995) (rejection of examining
5 psychologist's functional assessment which conflicted with his own
6 written report and test results). Thus, case law requires not only
7 an opinion from the consulting physician, but also substantial
8 evidence (more than a mere scintilla, but less than a
9 preponderance), independent of that opinion which supports the
10 rejection of contrary conclusions by examining or treating
11 physicians. *Andrews*, 53 F.3d at 1039.

12 Although Plaintiff's brief does not identify the specific areas
13 considered to be more than markedly limited, it appears those areas
14 concern speech and language and physical development, based on the
15 continuing special educational services provided in these areas.
16 Thus, the domains of acquiring and using information and moving
17 about and manipulating objects are at issue.

18 2. Acquiring and Using Information

19 The ALJ concluded the child had less than a marked limitation
20 in this domain, which includes an ability to acquire or learn
21 information and the use of that information. 20 C.F.R. §
22 416.926a(g). For children ages three to six, those skills include
23 learning to read, write and do arithmetic. Appropriate activities
24 include listening to stories, rhyming words, matching letters,
25 counting, sorting shapes and building with blocks, painting,
26 coloring, copying shapes, and using scissors. The child should be
27 able to ask questions, give answers, follow directions, describe
28 things, provide explanations, and tell stories. 20 C.F.R. §

1 416.926a(g)(iii). Examples of limited functioning in this domain
2 include a failure to understand words about space, size or time; an
3 inability to rhyme words or sounds in words; difficulty recalling
4 items learned in school the previous day; difficulty computing
5 arithmetic problems; an ability to talk only in short, simple
6 sentences with an inability to explain what is meant. 20 C.F.R. §
7 416.926a(g)(3).

8 The child's Individualized Educational Plan (IEP) and
9 evaluation completed in October 2003, indicated the child was
10 enrolled in a regular education kindergarten for all but 30 minutes
11 each day. The child was to receive supplemental services in the
12 classroom, including additional time for completing assignments, and
13 adaptation of testing, repetition of direction, and instruction in
14 small groups. (Tr. at 170.) He met the standard in letter
15 identification, but not in Phoneme Blending (single letter
16 pronunciation, e.g. *m* in *mat*) and Segment Onset-Rime, both dealing
17 with phonemic awareness skills. He also did not meet the standards
18 dealing with reading behaviors, but was able to answer questions
19 about stories and say what happened next. He was familiar with the
20 concept of same, different, top, middle, bottom, big, bigger, small
21 and smaller, but not left/right. He was able to count to ten,
22 recognized numerals to ten, matched objects and numerals to ten,
23 followed directions read to him and told how many objects were
24 missing in sets up to five. His behavior was appropriate and he
25 took direction well. (Tr. at 165.) Communication skills included
26 a limitation in ability to retell a story, use of very vague
27 language about the story in attempting to retell it, and difficulty
28 producing words with more than one syllable.

1 A marked limitation is defined as serious interference with an
2 ability to independently initiate, sustain or complete activities.
3 20 C.F.R. § 416.926a(e)(2). As demonstrated by test scores, a
4 marked limitation is two standard deviations below the mean. 20
5 C.F.R. § 416.926a(e)(2)(iii). The evaluation in 2003 indicated the
6 child's limitations, although present, did not impede his ability to
7 learn and function in a mainstream classroom. (Tr. at 166.) Thirty
8 minutes of speech therapy per week was recommended, as well as
9 supplementary aids and services in the general education
10 environment. (Tr. at 169, 170.) Other evidence indicated the child
11 was age appropriate in his ability to learn new skills. (Tr. at
12 195.) There was no evidence in the medical record the child was not
13 able to learn and acquire information. Thus, Dr. Meyer's conclusion
14 the child had a less than marked limitation in this domain is
15 supported by the evidence. However, even assuming a marked
16 limitation in this domain, that is insufficient to establish
17 disability, as the regulations require a marked limitation in two
18 domains or extreme limitation in one.

19 3. Moving About and Manipulating Objects

20 The ALJ concluded the child had no limitation in this area.
21 However, there is some evidence that conclusion is not supported by
22 the record.

23 The Appeals Council remanded for additional consideration of
24 the limitations assessed by the school evaluators in 2000 when the
25 child was not yet three years old: -2.05 deviations below the mean
26 in gross motor movement. (Tr. at 26-27, 75-76, 139-140.) In this
27 domain, consideration is given to moving the body in different kinds
28 of actions which demonstrate degrees of strength, coordination,

1 dexterity, pace, and physical ability to persist at the task. For
2 children, age three to six, this domain contemplates an ability to
3 walk, run, climb stairs, and use playground equipment with little
4 supervision. Fine motor skills include completing puzzles,
5 stringing beads, building with blocks, using crayons, markers and
6 small pieces in board games and an ability to cut with scissors. 20
7 C.F.R. § 416.926a(j)(2)(iii). Limited functioning would include
8 muscle weakness, joint stiffness, sensory loss, trouble climbing up
9 and down stairs, jerky or disorganized locomotion or difficulty with
10 balance, difficulty coordinating gross motor movements, sequencing
11 hand or finger movements, gripping or grasping, and poor eye-hand
12 coordination. 20 C.F.R. § 416.926a(e)(3).

13 The school evaluation in 2003 noted the child was able to walk
14 up and down stairs alternating feet with no support, but was unable
15 to hop on one foot. Other challenged areas included performing sit
16 ups, push ups, skipping, and running with reciprocal arm swing.
17 (Tr. at 165.) However, the child was able to balance on either foot
18 for at least five seconds, gallop, broad jump 12", walk heel to toe
19 along a line, catch a medium sized ball from five feet with his
20 hands, kick a ball at least six feet, and throw a tennis ball five
21 feet to hit a target. (Tr. at 165.) It was recommended the child
22 continue with physical therapy for 30 minutes each week to improve
23 strength and balance. (Tr. at 166.) Medical records did not
24 indicate further limitations or therapies were necessary. Thus, any
25 limitation would be less than a marked. 20 C.F.R. § 416.926a(e)(2).
26 The ALJ's conclusion the child suffered from no limitation in this
27 domain, though erroneous, was harmless error, as a less than marked
28 limitation would not qualify the child for benefits. *Curry v.*

1 Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1991) (whether findings of
2 fact are supported by substantial evidence or the law was correctly
3 applied by the ALJ are questions subject to the harmless error
4 standard).

5 4. Remaining Domains

6 There is no evidence, either from school records or medical
7 providers, that the child had limitations in fine motor skills or
8 the other domains. The domain of attending to and completing tasks
9 was limited by the hyperactivity, but school records indicated the
10 child was willing to participate, responded well to instruction, and
11 completed tasks with some delay, but less than marked. (Tr. at 194-
12 195, 358.) His GAF was rated at 60, indicating only mild
13 limitations. (Tr. at 359.) DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
14 DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995). There is no evidence
15 of limitations in the domain of relating and interacting with others
16 (Tr. at 195) or caring for self. As to health and physical well-
17 being, there was some evidence of seizures, but they were
18 infrequent, objective tests were within normal limits, and control
19 was achieved with medication. (Tr. at 369, 385.) After a review of
20 the record, it is concluded the consultant's opinion was supported
21 by the record and consistent with it. Thus, the ALJ did not err in
22 relying on it. Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 20**) is
25 **DENIED.**

26 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
27 **Rec. 23**) is **GRANTED.** Plaintiff's Complaint and claims are **DISMISSED**
28 **WITH PREJUDICE.**

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE